In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4351

EDWARD JOSEPH HAGEN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

Brief of Plaintiff in Error

CARKEEK, McDONALD, HARRIS & CORYELL
Attorneys for Plaintiff in Error
1164 Empire Building, Seattle, Washington

FILED
JAN 30 1925
F. D. MONCKTON,
CLERK

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4351

EDWARD JOSEPH HAGEN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

The plaintiff in error, Edward Joseph Hagen, together with Edward Wheeler Pielow, Charles Andrew Givens and Chris Brown, were jointly indicted in one count for conspiracy to violate the National Prohibition Act by possessing, transporting and selling intoxicating liquor. The indictment

contains five overt acts. First: That the defendants jointly maintained a dwelling house at 620 Broadway Avenue, in Seattle, Washington; second, the sale by plaintiff in error of twelve bottles of gin; third, the transportation of certain liquor by defendant Givens; fourth, the making and entering in writing "accounts showing the daily receipts and expenditures of money by the said conspirators;" and fifth, the unlawful possession of intoxicating liquors by all the defendants.

Plaintiff in error, together with defendants Pielow and Givens, were found guilty. Plaintiff in error was sentenced to imprisonment for the term of two years. (Trans. p. 26.)

Whereupon application was made for writ of error to review the judgment of the District Court, which having been granted, the case was brought to this court.

The indictment was filed March 8, 1923. (Trans. p. 5.) On March 14, 1923, the defendants moved to quash the indictment on the ground that the Grand Jury which returned the indictment based the same on evidence seized in violation of the constitutional rights of defendants. (Trans. p. 7.) On May 1, 1923, Defendant Ed. W. Pielow

petitioned for the return of the property illegally seized. (Trans. p. 15.) This petition was based on the grounds that the search warrant was void and was issued in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and of Title XI of the Act of Congress of June 15, 1917, and of the National Prohibition Act.

Both the motion to quash the indictment and to suppress, after argument, were by the Trial Judge denied and exception allowed. (Trans. pp. 13 and 24.)

The case came on for trial before the Honorable Jeremiah Neterer on February 28, 1924. The defendants again orally petitioned for the return of the property to them. The defendants, including plaintiff in error, adopted the grounds set out in the formal written petition previously filed by the defendant, Ed. W. Pielow. This application was denied and exception allowed. (Trans. p. 49.)

The evidence of the Government at the trial consisted almost entirely of books, papers and liquor seized by the agents of the Government, when they entered the premises of the defendants under the search warrant. All this evidence was admitted

over the objections of the defendants and exceptions were duly saved. (Trans. pp. 50, 61, 62, 63, 64.)

The court denied the defendants' motion for a new trial on March 25, 1924. (Trans, p. 29.) While preparing the proposed bill of exceptions for defendants, three days later, the then counsel for this plaintiff in error secured from the clerk of the District Court the Government exhibits. They consisted of a great mass of cards, slips and other documents. On examining them he discovered that Exhibits Nos. 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 20 and 21 were contained in envelopes with the words:

"Office of U. S. Attorney, Seattle, Wash.," printed on the outside and certain other inscriptions in writing, such as:

"Deposit slip to Credit Co.—Exp. Canada—Hagen had on person." "Bill came from Pielow's room 'Fred Moore' Bill."

"El 4583 W. El 5911, same No."

"U. S. vs. Ed Hagen from his person to be photographed." Card with secret No. on it presented by Ed Hagen—Hagen's person.

"Slips showing purchases."

"Rainier Club sales slips."

The exhibits were not in these envelopes when identified by the witnesses and admitted in evidence. The envelopes were not submitted in evidence, yet when the exhibits were given the jury they were in these envelopes and were taken by them jury into the jury room and considered by them. Counsel for plaintiff in error and the other defendants brought this newly discovered error to the attention of the trial court by filing a motion for reconsideration of their motion for a new trial. (Trans. p. 30.) This motion was by the trial court denied and exception allowed. (Trans. p. 37.)

The questions in the case are:

1. Was there a violation of the constitutional rights of the plaintiffs in error in the search of their dwelling and seizure of their papers?

2. Was the submission to the jury of envelopes not admitted in evidence and bearing prejudicial inscriptions thereon proper?

ASSIGNMENT OF ERRORS OF ED. J. HAGEN

Now comes the defendant, Ed. J. Hagen, by Fred C. Brown, his attorney, and in connection with his petition for a writ of error herein assigns the fol-

lowing errors, which he avers occurred in the trial of said cause, which were duly excepted to by him, and upon which he relies to reverse the judgment entered against him herein:

I. The District Court erred in denying the defendant's motion to quash the indictment herein on the ground that said indictment was founded on documents and other articles seized in the residence without authority in law in violation of his rights under the Fourth Amendment to the Constitution of the United States.

II. The District Court erred in denying the defendant's petition for the return of documents, liquor and other articles seized by United States Government prohibition officers in the residence on the night of February 20, 1923, in violation of his rights under the Fourth Amendment to the Constitution of the United States.

III. The District Court erred in denying the defendant's motion for a directed verdict of not guilty made at the close of the evidence to prove a conspiracy between the defendants or to prove any overt act on the part of any defendant as charged in the indictment.

IV. The District Court erred in denying the defendant's motion for a new trial.

V. The District Court erred in pronouncing judgment upon the defendant.

VI. The District Court erred in admitting in evidence Plaintiff's Exhibit No. 2, being a ledger purporting to record their transactions in the sale of intoxicating liquors, and in overruling the defendant's objection thereto on the grounds that the same had been forcibly seized and taken from the residence in the night-time by United States Government prohibition agents without lawful authority and in violation of his rights under the Fourth Amendment to the Constitution of the United States; and that its reception in evidence was a violation of his rights under the Fifth Amendment to the Constitution of the United States, the same being one of the documents for the return of which the defendant has made timely applictaion on the ground of such unlawful seizure.

For the reasons set forth in the sixth assignment of error and which are for convenience incorporated herein by reference.

The District Court also erred as follows:

VII. In admitting in evidence Government Exhibit No. 3.

XIII. In admitting in evidence Government Exhibit No. 4.

IX. In admitting in evidence Government Exhibit No. 5.

X. In admitting in evidence Government Exhibit No. 6.

XI. In admitting in evidence Government Exhibit No. 7. (33)

XII. In admitting in evidence Government Exhibit No. 8.

XIII. In admitting in evidence Government Exhibit No. 9.

XIV. In admitting in evidence Government Exhibit No. 10.

XV. In admitting in evidence Government Exhibit No. 11.

XVI. In admitting in evidence Government Exhibit No. 12.

XVII. In admitting in evidence Government Exhibit No. 13.

XVIII. In admitting in evidence Government Exhibits No. 14 and 15.

XIX. In admitting in evidence Government Exhibits No. 17, 18, 19 and 20.

XX. In admitting in evidence Government Exhibits No. 21 and 22.

XXI. In admitting in evidence Government Exhibit No. 24.

XXII. In admitting in evidence Government Exhibit No. 25.

XXIII. In admitting in evidence Government Exhibit No. 26.

XXIV. In admitting in evidence Government Exhibit No. 27.

XXV. In admitting in evidence Government Exhibit No. 28.

XXVI. In admitting in evidence Government Exhibit No. 29.

XXVII. In admitting in evidence Government Exhibit No. 33. (34)

XXVIII. In admitting in evidence Government Exhibit No. 35.

XXIX. In admitting in evidence Government Exhibit No. 42.

XXX. The District Court erred in permitting the witness, William M. Whitney, to testify as follows over the defendant's objection that the same was immaterial and not a subject for expert testimony:

"Q. Mr. Whitney, in your experience as a Prohibition Director, I will ask you what the abbreviations are for intoxicating liquor for gin?

"MR. VANDERVEER. I object as immaterial and not a subject for expert testimony.

"THE COURT. He may answer.

A. "G."

"MR. VANDERVEER. It is not proven that these are any established abbreviations.

"THE COURT. I understand; he just asked what they are.

"Q. What is the abbreviation for Scotch?

"A. "S."

"MR. VANDERVEER. The same objections to run to each of these.

"THE COURT. Yes.

"Q. What is the abbreviation for Bourbon?

"A. "B."

"Q. What is the abbreviation for Three Star Hennessy?

"A. "Three Stars."

"Q. What is the abbreviation for Old Parr?

"A. "OP."

"Q. What is the abbreviation for Haig's Dimple?

"A. "HD," sometimes "P."

"Q. What is the abbreviation for Hill & Hill? (35)

"A. Well, it is usually "H&H," sometimes "LL."

"Mr. Vanderveer. Objection shown to each question. It is not a subject for expert testimony, and it is wholly immaterial.

"The Court. Yes; overruled.

"Mr. Vanderveer. Exceptions.

"Q. What is the abbreviation of Johnny Walker's Red Label?

"A. "JWRL."

XXXI. The District Court erred in denying the defendant's motion for a reconsideration of their motion for a new trial filed herein on March 29th, 1924.

XXXII. The District Court erred in denying and not granting the motion for a rehearing filed on April 23rd, 1924.

XXXIII. The District Court erred in signing and filing the order denying the motion for reconsideration of defendants' motion for new trial and motion for rehearing.

WHEREFORE, the said Ed. J. Hagen, plaintiff in error, prays that the judgment of said Court be reversed and this cause be remanded to said Circuit Court with instructions to dismiss same and discharge the plaintiff in error from custody and exonerate the sureties on his bail bond, and for such other and further relief as to the Court may seem proper.

FINAL ISSUES.

The above errors may be grouped for the purpose of simplifying the argument into two fundamental questions which, therefore, become the main issues in the case.

Errors One to Twenty-Nine, Inclusive, Rest upon Issue I.

Was there such a violation of the constitutional rights of the plaintiffs in error in the search of the dwelling house and seizure of his property, as to require the suppression of the evidence of the commission of the crime gained thereby?

Errors XXXI, XXXII and XXXIII Rest Upon Issue II.

Was the submission to the jury of envelopes not admitted in evidence and bearing prejudicial inscriptions reversible error?

Error XXX will not be discussed.

ARGUMENT.

At the threshold of this case we are met with a serious question, involving the constitutional rights of the plaintiff in error.

The Federal Courts have consistently enforced the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, even

though the result has been in many cases that the guilty man has gone unpunished, and it has held that this fundamental law protects him as well as the innocent.

Weeks vs. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 Law Ed. 652.

Atlantic Food Products Corp. vs. McClure, 288 Fed. 982.

United States vs. Bookbinder, 278 Fed. 216.

United States vs. Mitchell, 274 Fed. 128.

United States v. Kelih, 272 Fed. 484.

As a corollary to this, it has been held that the success of an unlawful search does not make the result lawful.

United States vs. Slusser, 270 Fed. 818.

With these principles in mind, we shall proceed to discuss the first issue, to wit, the legality of the search and seizure of the property of the defendants and the use of the evidence so obtained against them.

Issue I.

The Honorable District Court erred in overruling the motion of the plaintiffs in error to quash the indictment and for return or suppression of the evidence.

Point 1. The issuance of the search warrant was void, because

(1) The affidavit did not state facts showing probable cause.

It is, of course, elementary that under the statute (Sec. 3, Title 11, Act of June 15, 1917, commonly known as the Espionage Act) the affidavit filed as the basis for the issuance of a search warrant must state facts and not conclusions.

Lochnane et al vs. U. S. (decided by this court, opinion filed November 10, 1924).

Atlantic Food Products Corp. vs. McClure, 288 Fed. 982.

Lipschutz vs. Davis, 288 Fed. 974.

U. S. vs. Harnich, 289 Fed. 256.

In re Rossenwasser Bros., 254 Fed. 171.

Schencks vs. United States (C. C. A.) 2 Fed. (2d) 185.

In this case Gordon B. O'Harra, prohibition agent, swore that "one Ed Hagen and employees on the 28th day of February, 1923, and thereafter was, has been and is possessing and selling intoxicating liquor all for beverage purpose on premises described as 122 Broadway, Seattle, Washington." (Trans. p. 22.) The foregoing is the only portion

of the affidavit that in the slightest degree tends to set forth any facts from which probable cause could be inferred. Nothing but mere conclusions are stated. The affidavit contains no facts from which the United States Commissioner could determine that probable cause existed for the issuance of a search warrant. The case cannot be distinguished from that of *Lochnane vs. United States Supra,* where on an almost identical affidavit your Honors held the search warrant void as based on an affidavit which failed to set forth facts sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant. Cases in which practically the identical language was used in the affidavit for the issuance of a search warrant as is now before the court in this case and in which the Federal Courts have held that a search warrant based on such affidavit was void, will be found as follows:

Giles vs. United States, 284 Fed. 208.

United States vs. Illig, 288 Fed. 939.

United States vs. Yuck Kee, 281 Fed. 228.

United States vs. Kaplan, 286 Fed. 963.

(2) It did not sufficiently describe the property to be seized.

SECTION 3, Title 11, Act of June 15, 1917, known as the Espionage Act, under which the search warrant was issued, provides the affidavit must particularly describe the property and place to be searched (1918 Sup. Fed. St. Ann., p. 129). The affidavit upon which this search warrant was issued gives absolutely no description of the property to be seized. Again, SECTION 6 of the same act provides the warrant must command the officer to search the person or place named for the "property specified." The warrant in this case commands the officer to "seize any and all of the said property in or about the commission of said crime." It fails, however, to describe any property whatsoever. (Trans. p. 19.) The failure of either the affidavit or the warrant to particularly describe the property to be seized renders the search and seizure thereunder void.

United States vs. Boyd, 1 Fed. (2d) 1019.
Honeycutt vs. United States, 277 Fed. 939.
Lipschutz vs. Davis, 288 Fed. 974.

(3) The United States Commissioner was without jurisdiction to issue a search warrant authorizing the seizure of written documents.

The National Prohibition Act furnishes the authority under which this warrant was issued. Section 25 thereof authorizes the issuance of search warrants for liquor or property designed for the manufacture of liquor (1919 Sup. Fed. St. Ann. p. 213). This section further provides that search warrants may issue under Title 11 of the Espionage Act for "such liquor and the containers thereof and such property." The proceedings being purely statutory, there is no basis in law for the issuance by the United States Commissioner in a liquor case of the search and seizure of books and documents.

It follows that the evidence of the crime in this case has been illegally acquired in that no valid search warrant was issued for the reasons that the search warrant issued was not based on a sufficient affadavit, did not particularly describe the property to be seized and could not issue for the seizure of written documents, that such evidence should be suppressed, and there being no other independent or competent evidence of guilt of the plaintiffs in error, the case should be reversed on this point and ordered dismissed.

Lochnane vs. United States, Supra .

Boyd vs. U. S., 116 U. S. 616; 29 L. Ed. 746, 6 Sup. Ct. 524.

Weeks vs. U. S., 232 U. S. 383; 59 L. Ed. 652; L. R. A. 1915 B. 734; 34 Sup. Ct. 341;

Ann. Cas. 1915 C 1177.

Silverthorne Lumber Co. vs. U. S., 251 U. S. 385; 64 L. Ed. 319; 40 Sup. Ct. 182.

Amos vs. U. S., 255 U. S. 313.

Gouled vs. U. S., 255 U. S. 298; 41 Sup. Ct. 261.

U. S. vs. Slusser, 270 Fed. 819.

U. S. vs. Falloco, 277 Fed. 75.

Honeycutt vs. U. S., 277 Fed. 939.

Woods vs. U. S., 279 Fed. 706.

Lambert vs. U. S., 282 Fed. 413, 414, 417.

Giles vs. U. S., 284 Fed. 208.

Snyder vs. U. S., 285 Fed. 1.

U. S. vs. Case, 286 Fed. 627.

U. S. vs. Innelli, 286 Fed. 731.

U. S. vs. Kaplan, 286 Fed. 963, 973.

U. S. vs. Myers, 287 Fed. 260.

Ganci vs. U. S., 287 Fed. 60.

U. S. vs. Leppe, 288 Fed. 136.

Pressley vs. U. S., 289 Fed. 477.

U. S. vs. Musgrave, 293 Fed. 203.

Murby vs. U. S., 293 Fed. 849.

Salata vs. U. S. (C. C. A.) 286 Fed. 125, 126.

ISSUE II.

The Honorable Trial Court erred in overruling the motion of the plaintiffs in error for reconsideration of their motion for a new trial.

It is undisputed that a large number of envelopes, which were not introduced in evidence and which, with notations thereon highly prejudicial to the defendants, were submitted to the jury and were considered by them in deliberating upon their verdict. (Trans. pp. 31, 32, 33, 34, 35, 36.) That it was prejudicial error to submit such evidence to the jury requires no serious discussion.

Ogden vs. U. S., 112 Fed. (3 C. C. A.) 523.

Alaska Com. Co. vs. Dinkelspiel, 121 Fed. (9 C. C. A.) 318.

Meyer vs. Calwalader, 49 Fed. 32.

U. S. vs. Clarke, 25 Fed. Cas. No. 14810.

Hutchinson vs. Decatur, 12 Fed. Cas. No. 69556.

Abbott vs. State (Ga.) 100 S. E. 759.

Warde vs. State (Okla.) 162 Pac.

Thomas vs. State (Okla.) 164 Pac. 995,99.

We submit that it clearly appears that error was committed in the following material matters to the prejudice of plaintiff in error:

(1) The evidence upon which he was convicted was obtained by a violation of constitutional rights.

(2) The jury had before it documents not admitted in evidence highly prejudicial to plaintiff in error.

From both of these standpoints the conviction of the plaintiff in error was wrong. Being contrary to principle and precedent, we submit the judgment should be reversed, with direction to the lower court to grant the motion to suppress the evidence illegally seized and grant plaintiff in error a new trial.

Respectfully Submitted,

CARKEEK, McDONALD,
HARRIS & CORYELL,
Attorneys for Plaintiff in Error,
Edward Joseph Hagen.